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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Statement

This *amicus curiae* brief is submitted on behalf of the Association of American Publishers, Inc. (hereinafter referred to as the "AAP") pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of Petitioners. Counsel for Petitioners and Respondent have consented to the filing of this brief and the letters of consent are filed herewith.

Interest of the AAP

The AAP is a trade association organized under the laws of the State of New York. It is composed of publishers of general books, textbooks and educational materials. Its more than 260 members, which include many university presses and religious books publishers, publish in the aggregate the vast majority of all general, educational and religious books produced in the United States. None of the Petitioners is either a member of or in any way affiliated with the AAP. Neither is the publisher of "The Illustrated Presidential Report of the Commission on Obscenity and Pornography", the subject of the brochure here in issue, a member of the AAP.

The AAP has filed an *amicus curiae* brief in support of the Appellant in *Jenkins* v. *Georgia* (No. 73-557) which, according to the Court's Order of January 14, 1974, will be heard in tandem with the instant case. In light of this indication that the two cases will be considered together, the AAP respectfully requests the Court to consider both the statement of interest and all of the arguments set forth in its *amicus* brief in *Jenkins* when reviewing the convictions of the Petitioners herein. *Amicus* purposely has not burdened the Court by a repetition of those arguments which, it submits, are equally applicable to the issues presented by this case.

The AAP files this additional brief because it believes that the facts and issues involved in this case, while clearly different from those in the *Jenkins* case, equally compel the conclusion that the limits of obscenity regulation should

be permitted to extend no further than well defined efforts to avoid exposure to minors and intrusion on the privacy and sensibilities of unwilling adults.

ARGUMENT

This case on certiorari from the Court of Appeals for the Ninth Circuit involves the criminal convictions of the Petitioners for the mailing of materials which the jury and the Circuit Court found to be obscene under 18 U.S.C. §1461. Prior to the verdict of the jury in the criminal trial, no judicial determination of obscenity with respect to these materials had been made. And yet, in addition to substantial fines, Petitioner Hamling has been sentenced to four years imprisonment, Petitioner Kemp to three years and one day and Petitioners Wright and Thomas to one and a half years suspended, but with five years of probation. The Petitioners are presently free on bail pending review of their convictions by this Court—and that temporary freedom has been gained only by posting bail in sums ranging from $1,000 to $15,000.

These convictions and severe penalties result from the jury's determination that the materials were "nonmailable matter" because they are "obscene, lewd, lascivious, indecent, filthy or vile" (18 U.S.C. §1461). As the numerous examples set forth in the AAP's *amicus* brief in *Jenkins* amply demonstrate, certain juries might equally find books by Kurt Vonnegut, Edgar Lee Masters or other equally renowned authors to be "obscene, lewd, lascivious, indecent, filthy or vile". Clearly, the prohibitions set forth in Section 1461 provide no standard whatsoever.

While the jury here was instructed to determine obscenity by applying the three-pronged *Roth-Memoirs*[1] test and while that test has been further modified by the *Miller* ruling,[2] the AAP submits that neither the *Roth-Memoirs* nor the *Miller* nor, indeed, any other articulation provides or can provide sufficient amplification of the terms "obscene, lewd, lascivious" etc. to guide the conduct of the producers or distributors of any written or visual materials.

Indeed, notwithstanding the recent *Miller* amplification and attempted clarification of the definition of obscenity, the Second Circuit Court of Appeals in affirming an obscenity ruling with respect to the animated cartoon Sinderella acknowledged that "probably every judge" of this Court would admit to the "inability" to define obscenity specifically but in reaching a decision would "rely" on Mr. Justice Stewart's comment in *Jacobellis* v. *Ohio*. 378 U.S. 184 (1964) that "I know it when I see it." It would appear that the "I know it when I see it" approach led directly to the Second Circuit affirmance in *U.S.* v. *Sinderella* (73-1171) N.Y. Law J., Feb. 13, 1974, p. 1, col. 3.

The AAP submits that if the distinguished judges of the Second Circuit are relegated to this subjective standard, juries—grand and petit—will rely on their own personal and subjective reactions to the materials they are considering. And, here, it even appears that the members of the grand jury were advised to be "guided solely by their instinctive feeling" by the standards of "moral judg-

1. *Roth* v. *United States*, 354 U.S. 476 (1957); *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966).

2. *Miller* v. *California*, 413 U.S. 15 (1973).

ment" which they had "assimilated through the totality of their experience" and that they were the "sole judges of the contemporary community standards of this country" (481 F.2d 307, 312 (9th Cir. 1973)). While these comments exacerbate the inevitably subjective and emotional nature of the determination jurors must make, the AAP believes that determinations of obscenity will be subjective regardless of the tests the jurors and/or judges seek to apply.

To subject Petitioners, or anyone else, to the harshness of the criminal process for activities not known to be unlawful until a judge or jury has convicted and sentenced them is a gross violation of due process and a severe blow to the First Amendment protection of all ideas—even, and especially, controversial ideas.

The AAP does not suggest, by the filing of this brief, that the materials here involved may not offend those who received them unsolicited through the mails. Through such mailings, materials such as these in question may well infringe upon the privacy and sensibilities of adults and may well get in the hands of minors contrary to the desires of their parents.

To prevent such intrusion or thrusting, the AAP believes that carefully drawn regulations on the dissemination of unsolicited materials can be appropriate. Although 18 U.S.C. §1461 does deal with mailings, it is too crude a statute to apply to prevent thrusting. It makes no distinction between solicited and unsolicited materials; it requires the imposition of criminal penalties as its sole sanction and it neither provides remedies for the recipients of such unsolicited materials nor mechanisms for such persons to be protected from thrusting or pandering.

Because 18 U.S.C. §1461 is the principal law under which Petitioners were charged and convicted, the AAP respectfully submits that the convictions herein should be reversed regardless of whether the manner of dissemination of the materials in question could properly and constitutionally be regulated.

Conclusion

For the reasons set forth herein as well as for all of the reasons set forth in its *amicus* brief in *Jenkins* v. *Georgia*, the Association of American Publishers, Inc. requests the Court to reverse the convictions rendered and affirmed below.

Respectfully submitted,

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